

South Dakota's GEAR UP Scandal and Possible Solutions

by Michael L. Wyland

To those unfamiliar with South Dakota's GEAR UP scandal, I encourage you to visit the KELOLAND.COM web site and watch and read Angela Kennecke's excellent reporting. In addition, recent USD graduate Anna Madsen prepared an inspired narrative on the details of the scandal as her honors thesis which will be made available at the USD Library later in 2018.

The GEAR UP scandal exposed a flaw in South Dakota's governmental structure. Specifically, it exposed the gap between two state oversight and enforcement organizations: the Division of Criminal Investigation (DCI), housed in the executive branch of state government, and the SD Legislature's Government Operations and Audit Committee, often referred to as GOAC. The purpose of this article is to discuss this gap and propose a solution.

My thesis is based on my understanding that GEAR UP was primarily a management failure, not a criminal activity¹. While federal grant dollars and presumed state-level matching funds were diverted from their intended purpose by multiple individuals using multiple organizational entities, GEAR UP's financial troubles were secondary to, and in many ways, consequential to management failures. Relatively minor finance-related charges have been brought by the SD Attorney General against some people involved in GEAR UP's activities and accounting². These facts leave both DCI and GOAC ill-equipped to address GEAR-UP, resulting in frustration, lack of resolution, and a tacit belief that more such scandals may emerge.

¹ There is no reasonable question that the murder-arson-suicide of the Westerhuis family in 2015 was a series of tragic criminal acts, and that those crimes can be indirectly traced to the conduct of the GEAR UP program in South Dakota. In this essay I am discussing the direct activities associated with GEAR UP in South Dakota rather than the decisions made and actions committed by Scott Westerhuis personally against his family and himself when the state terminated its contract with his employer, Mid-Central Educational Cooperative.

² Dan Guericke accepted a plea agreement from the SD Attorney General which included a guilty plea on one count of falsification of evidence in exchange for cooperation with the GEAR UP investigation. Stacy Phelps and Stephanie Hubers were each found not guilty after their respective jury trials.

Shared State and Federal Government Responsibility

Simply put, the South Dakota Department of Education was the applicant for both of the state's GEAR UP applications. However, no one in South Dakota state government leadership, most particularly the state's education department, ever had interest in GEAR UP. No one in state government ever developed interest in it, except to eventually identify its operation as a state-level financial accountability problem to be handled. Despite assurances included in the state's 2005 and 2011 GEAR UP grant applications, no state resources were ever allocated to GEAR UP, including virtually absent programmatic (as opposed to financial) oversight by state government leaders.

South Dakota's GEAR UP was an orphaned program, an "out of sight, out of mind" initiative administered by contract far from the state capital. As far as the state as concerned, no news was good news; only when the news became bad did state officials become involved, and, even then, only in a limited and self-defensive way. The "news" was limited to issues of financial accountability - at no point did state officials evince any concerns about the state's GEAR UP programmatic operations or outcomes. This limited and defensive response by state government is, in large part, reflective of the dual nature of federal grant oversight (see below).

The federal government shares blame with the state for South Dakota's GEAR UP scandal. South Dakota's hastily-prepared 2005 grant application was approved by the U.S. Department of Education despite its being of generally poor quality and nonresponsive or noncompliant with some federal GEAR UP requirements, most notably the requirement that at least 50 percent of funds be directed to college scholarships for program participants³. The state's evaluation report at the end of the six-year grant period showed little or no impact, despite expenditure of almost \$7 million in federal funds and a similar amount in local match. Even though the 2005-2011 GEAR UP program in South Dakota was unsuccessful, the state's 2011 application for 2012-2018 was not only approved, but approved for more than three times the

³ The state's 2005 GEAR UP application included a small allowance for scholarships, but there is no evidence any scholarships were awarded. The state's 2011 GEAR UP application included a scholarship waiver request, saying that Native American and other children in need of financial assistance had adequate access to college scholarships and financial support through other sources.

initial award - about \$24 million in federal funds to be matched by \$24 million in state and local effort.

Why did the U.S. Department of Education approve a deficient and noncompliant grant application? No one knows for sure, but experience points to two influencing factors. First, some federal programs are intended to be deployed in all states. Federal staffs are under pressure to seek out and encourage “approvable” applications rather than apply a competitively uniform quality standard that might result in some states and regions not having programs. Second, South Dakota’s GEAR UP applications stressed both technology education and targeting of Native American youth - two worthwhile and attractive program features that made the “approvable” standard easier to attain.

Another federal limitation on effective grant administration is the separation of duties between program oversight and fiscal oversight by federal staffs (the structure often also shows up in state government administration, such as in South Dakota (see above)). It’s common for two different people to administer a federal grant and actively resist speaking with each other. The program officer doesn’t speak with the fiscal officer, and vice versa. Without such communication, it is virtually impossible to develop a value assessment of any federal grant-funded activity. The program officer can monitor design and evaluation activities, and the fiscal officer can verify that the right amounts are being paid for approved expenses. However, no one combines the results to determine whether funds have been spent effectively to fulfill the goals affecting intended beneficiaries (in this case, Native American and other economically disadvantaged students in South Dakota).

In short, South Dakota should never have applied for either GEAR UP grant, and the federal government should never have funded either grant. These governmental failures led to the consequential difficulties at the state and local levels, including the use of school district and nonprofit entities to mismanage the program. Regardless, the problems’ origins are governmental. The failures of school districts, nonprofits, and individuals outside state government were a consequence set in motion by governmental failure.

The Frustrations of Investigation

The deaths of a six-member family and the mismanagement of millions of federal dollars entrusted to the state education department called for investigation. The state's Division of Criminal Investigation (DCI) spearheaded the criminal investigation. The investigation concluded that Scott Westerhuis was intimately involved with financial improprieties related to SD GEAR UP and, when those improprieties were discovered and action taken, he was the person who killed his family, burned down his house, and killed himself.

The investigation also resulted in the indictment of three defendants on felony charges. One employee was accused of grand theft and grand theft by deception, with alternative counts of receiving stolen property. Two executives were accused of falsification of evidence and conspiracy to offer forged or fraudulent evidence.

None of the state criminal charges or investigations resulted in identifying what went wrong with the GEAR UP program in South Dakota and who was responsible. Even if Scott and Nicole Westerhuis had lived to face likely criminal charges, the conduct of those criminal trials would focus on the money and have been insufficient to identify the leadership and management failures which placed the couple in a position to be accused of committing GEAR UP-related crimes.

There is little doubt, based on documentation available, that the state committed \$62 million in federal grant funds and state-coordinated matching dollars to achieving GEAR UP goals and objectives. There is equally little doubt that the program did not achieve its goals and objectives, or come anywhere close to doing so⁴. However, there is woefully little evidence that the program's failures had much to do with crimes associated with the handling of GEAR UP funds.

⁴ See Brinda Kuhn's 2009 GEAR UP program evaluation report and the USD Government Research Bureau (GRB) 2014-2015 GEAR UP program evaluation report for details.

Looking to issues of noncriminal financial oversight, the South Dakota Legislature, as part of its executive branch oversight responsibility, uses the Government Operations and Audit Committee (GOAC), with liaison to the Department of Legislative Audit (DLA) under the direction of the state Auditor General.

Much is made of the dual responsibility implied by GOAC's name - both government oversight and audit. However, GOAC's approach to GEAR UP was limited by several factors both within and outside its control. First, the SD Auditor General told GOAC committee members during their August, 2017 meeting in Pierre that DLA does financial audits - it does not perform management audits. Second, each executive branch department set its own records retention and destruction policies, making audits subject to records availability over which DLA has no control. Since the state's education department had a five-year retention policy, no records were presumed to exist addressing the state's 2005 GEAR UP grant, and not all records pertaining to the 2011 grant application were still available to auditors when requested. Third, GOAC's charter of work was onerous, with some members seeing focusing on GEAR UP as distracting the committee from its expected work of auditing the state's budget and its planned oversight activities.

Separately, there was conflict over the limits of GOAC's investigatory powers. Could GOAC compel state employees and state agency leaders to testify? Could it compel the state's contracted entities, such as Mid-Central Educational Cooperative, to testify? Could it compel nongovernmental organizations receiving funds from or through the state, such as corporations, nonprofits, and independent contractors, to testify? Did the committee have subpoena power? Could it place witnesses under oath?

In the end, the state's criminal investigators⁵ were limited to tracking relatively compartmentalized criminal activity, and GOAC and DLA were limited in their efforts to both "follow the money" and to identify the management failures associated with the scandal.

⁵ There were rumors of one or more federal investigations related to the GEAR UP program in South Dakota, but the FBI and U.S. Justice Department/U.S. Attorney typically neither confirm nor deny the existence of an investigation unless federal charges are sought.

Possible Solutions

Based on the preceding, as well as a reading of Ms. Madsen's honors thesis and Ms. Kennecke's reporting, there is ample evidence that:

- 1) the GEAR UP scandal was primarily a management and leadership failure rather than a criminal enterprise; and
- 2) state government is, at present and by its leaders' own admissions, ill-equipped to provide oversight and investigation of non-criminal, non-financial issues in executive departments.

One approach would be to rewrite and rededicate GOAC to a dual mission of oversight and financial audit. Since the Auditor General states that DLA doesn't do management audits, and because we know from staff and legislators alike that GOAC is heavily burdened with its current work, changes would need to be made to DLA and GOAC to accommodate this change in mandate. Additional staff could be hired to fulfill this expanded role, and legislators could be added to the current committee, perhaps even prompting GOAC to create two or more subcommittees from among its committee members to facilitate their work. Of course, the more GOAC committee members there are, the more difficult schedule coordination would be and the longer the full committee agendas might become. Further, DLA roles and the position descriptions for the Auditor General and DLA staff would need to be restructured in order to encompass the expertise and leadership experience to pursue an expanded mission which embraces non-financial issues as well as financial ones.

Another approach would be to provide staff to all legislative committees to support the addition of programmatic and managerial oversight and investigations to their respective charters of work. However, this would cause massive staff growth and significant duplication (i.e., each committee would have staff with similar job descriptions performing similar tasks) and introduce the potential for each committee to pursue minor and frivolous oversight simply because it possessed the capacity to do so.

My Proposal - A New Committee and New Staff

The solution to the problem is, quite simply, to restrict GOAC's committee charter to financial oversight and investigation, as is its current practice and limitation based on statements by the Auditor General. Replicate GOAC's structure and function in a new oversight and investigative function under the SD Legislature dedicated to program and management review of state government.

The new body could coordinate its activities with GOAC and DCI, just as GOAC and DCI currently coordinate their activities, but it would have its own legislative committee, its own budget, and its own staff support through an office analogous to, but independent of, DLA and the Auditor General. It would operate as a legislative committee and be "chartered" with a negotiated subpoena power sufficient to enforce its oversight and investigative mandate.

There are definite costs associated with this approach, including the hiring of full-time employees at professional, paraprofessional, and support levels. Some of the budgetary costs might be recovered from relieving the burdens on the current GOAC, but this reshuffle is realistically unlikely to be achieved because, as has been noted above, GOAC is heavily tasked with audit and financial oversight duties.

I do not take the issues of additional financial commitment and bureaucratic expansion lightly. However, one federal grant administered by one state agency resulted in the effective wasting of tens of millions of federal dollars and an equivalent waste of local educational resources. The biggest waste associated with GEAR UP, of course, wasn't the financial waste - it was the breach of promise to the state's Native American and other economically disadvantaged students that the state would address college readiness and college success through its GEAR UP efforts. We know that Mid-Central Educational Cooperative, with Scott and Nicole Westerhuis in financial leadership, administered other federal grant programs on behalf of the state's Department of Education.

Based on the events associated with GEAR UP, it would be reasonable for the state to investigate the programmatic and management of these other state education contracted and MCEC-operated programs. However, just as in the case of GEAR UP, that programmatic and management investigation has not been done.

Building on this argument, it would be prudent to have the capacity to examine and assess program and management success in other state agencies and departments to verify that what happened with the education department and GEAR UP isn't happening elsewhere in state government.

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